



STATE OF NEW JERSEY
Board of Public Utilities
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ENERGY

IN THE MATTER OF THE JOINT PETITION)	ORDER ON MOTION OF MID-
OF PUBLIC SERVICE ELECTRIC AND GAS)	ATLANTIC SOLAR ENERGY
COMPANY AND EXELON CORPORATION)	INDUSTRY ASSOCIATION
FOR APPROVAL OF A CHANGE IN CONTROL)	FOR INTERLOCUTORY REVIEW
AND RELATED AUTHORIZATIONS)	

BPU DOCKET NO. EM05020106
OAL DOCKET NO. PUC1874-05

(SERVICE LIST ATTACHED)

BY THE BOARD¹

This Order memorializes the decisions rendered by the Board at its regularly scheduled May 16, 2006 agenda meeting regarding a request for interlocutory review, pursuant to N.J.A.C. 17:27-14.10(a) et seq., by the Mid-Atlantic Solar Energy Industry Association. ("MSEIA"). MSEIA seeks interlocutory review of an Order of Administrative Law Judge ("ALJ") Richard McGill denying MSEIA permission to intervene and instead granting it participant status in the above-captioned matter. MSEIA requests that the Board grant review of ALJ's McGill's Order and overrule ALJ McGill's Order so as to allow MSIEA to intervene. Board Staff and Public Service Electric and Gas Company ("PSE&G") and Exelon Corporation ("Exelon") (collectively, "Joint Petitioners") oppose the request for interlocutory review.

At its regularly scheduled agenda meeting of May 16, 2006 the Board granted the request for interlocutory review. At the same meeting, the Board determined that the parties had fully briefed their arguments in support and opposition of the motion for intervention in the motion and responding papers for interlocutory review and, in order to further the interests of justice and ensure that the proceedings not be delayed, the Board affirmed ALJ McGill's order denying MSEIA's request for intervenor status and allowing MSEIA participant status.

BACKGROUND/ PROCEDURAL HISTORY RELEVANT TO MOTION

The Joint Petition of Public Service Electric and Gas Company and Exelon Corporation, filed with the Board on February 4, 2005, and thereafter supplemented by letters dated

¹ Commissioner Christine V. Bator recused herself from this matter due to a potential conflict of interest.

February 7, 9, and 28, 2005, requests that the Board issue an Order: 1) approving the acquisition of control of PSE&G as contemplated by an Agreement and Plan of Merger between Exelon Corporation and Public Service Enterprise Group Incorporated, dated as of December 20, 2004 (Exhibit JP-1C); 2) authorizing Exelon's subsidiary Exelon Energy Delivery to acquire control of PSE&G, pursuant to N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-10; 3) authorizing the recording of a regulatory asset to offset the purchase accounting adjustments resulting in an increase in the balance sheet liabilities for PSE&G's pension plans and other retirement benefits; 4) approving a General Services Agreement and Mutual Services Agreement (Exhibits JP-1E and 1F) pursuant to N.J.S.A. 48:3-7.1; 5) approving PSE&G's execution of and action in accordance with the Exelon Utility Money Pool Agreement (Exhibit JP-1G) pursuant to N.J.S.A. 3-7.2; and 6) including determinations pursuant to the Public Utility Holding Company Act of 1935. Thirty three parties filed timely motions for intervention in this proceeding. The parties to this proceeding include: Joint Petitioners; the Staff of the Board of Public Utilities ("Staff"); the Division of the Rate Payer Advocate ("RPA"); Amerada Hess Corporation; Cinergy Marketing & Trading; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energy America, LLC; Direct Energy Business Services; East Coast Power; Gerdau Ameristeel Corporation; Independent Energy Producers of New Jersey; Jersey Central Power & Light Company; First Energy Solutions Corporation; Local Union 94 of the International Brotherhood of Electrical Workers; Local Union 97 of the International Brotherhood of Electrical Workers; Local Union 153 of the Office and Professional Employees International Union, Local 601 Utility Workers Union of America, AFL-CIO; Local 855 of the Public Utility Constructors and Gas Appliance Workers of the State of New Jersey; Local 1289 of the International Brotherhood of Electrical Workers; New Jersey Department of Environmental Protection; Retail Energy Supply Association; Midwest Generation, LLC; Mount Holly Municipal Utilities Authority; Pennsylvania Gas Works; The City of Philadelphia; Stony Brook Regional Sewage Authority; Natural Resources Defense Council; New Jersey Citizen Action; New Jersey Large Energy Users Coalition; New Jersey Natural Gas Company; New Jersey Public Interest Research Group Citizen Lobby, Inc.; NUI Utilities, Inc.; PPL Parties; Pepco Holdings, Inc.; Rockland Electric Company; and South Jersey Gas Company. Evidentiary hearings were conducted on January 4-6, 9-13, 17-20, 2006, March 9, 10, 24, 27, 2006 and concluded on March 31, 2006.

On April 18, 2006, MSEIA filed its application for intervention. Joint Petitioners and Staff and opposed the application. By order dated April 25, 2006, ALJ McGill denied MSEIA's request for intervention and granted participant status.

ALJ's Order

By Order dated April 25, 2006, ALJ McGill denied the April 18, 2006 motion by MSEIA for intervention and instead allowed it to participate with all of the rights set forth in N.J.A.C. 1:1-16.6(c), i.e., the rights to argue orally, file a statement or brief, and file exceptions to the initial decision with the agency head. The ALJ considered the standards for intervention in N.J.A.C. 1:1-16.3, which are discussed below, and in considering one such factor, the nature and extent of the movant's interest in the outcome of the case, he also considered the factors set forth in N.J.S.A. 48:2-51.1 for approval to acquire control of a public utility, including the impact of the acquisition on rates and service. He ruled that MSEIA is mainly concerned with the provision of solar electric photovoltaic power generators, which provide various benefits, such as reduced generation, transmission and distribution of electricity; decreases in air pollution; less reliance on natural gas; and reduced dependence on foreign sources of fuel. MSEIA's interests are not directly related to the considerations under N.J.S.A. 48:2-51.1. MSEIA has not demonstrated that it will be impacted substantially, specifically and directly by the proposed merger, MEISA's interest is not sufficiently different from that of any party so as to add measurably and

constructively to the scope of the case and MSEIA's interests are adequately represented by Staff. ALJ McGill noted that the hearings in this matter are complete, so MEISA will not have the opportunity to present proofs as to factual assertions. MSEIA states that the purpose of its intervention is to participate in settlement negotiations and it is likely to seek a provision in a conditional approval to provide it with funding. In the event that the parties reach a settlement that is not satisfactory to MSEIA, if MSEIA does not agree to a settlement and the record is not fully developed as to MSEIA's concerns, the situation is likely to lead to confusion and delay. He found that MEISA does not meet the standards for intervention, its interests are adequately represented by Staff, but that it had "demonstrated that it has a significant interest in the outcome of this proceeding," and therefore, should be allowed to participate.

MSEIA'S Motion for Interlocutory Review

On May 3, 2006, MSEIA filed a motion for interlocutory relief from ALJ McGill's denial of its motion for intervention, along with a supporting certification of Thomas Leyden, president of MEISA. By its motion, MSEIA requests that it be permitted to intervene with full procedural and substantive rights, for the limited purpose of participating in settlement discussions.

MSEIA's members include approximately 65 providers of solar electric photovoltaic ("PV") power generators which provide electricity through PV panels installed on the roofs, parking lots and fields of PSE&G customers, offsetting purchases of Basic Generation Service ("BGS"). MSEIA states that its intervention will promote positive benefits for the state. In its initial motion for intervention, it states that its members assist retail customers by reducing their demand on the energy grid, reducing peak demand, reducing utility expenses for investment in infrastructure, reducing air pollution, and by reducing dependence on both natural gas and foreign oil sources.

MSEIA objects to ALJ McGill's finding in denying intervention to MSEIA, that inclusion of a party "without a real stake in the outcome of the proceeding presents a danger of confusion or undue delay" and then notes that in contrast to his denial of intervention, in granting MSEIA participant status, the ALJ found that MSEIA has a "significant interest in the outcome of the proceeding." It further objects to the ALJ's statements that "MSEIA's interests are adequately represented by Staff" and that "[i]f MSEIA is does not agree to a settlement and the record is not fully developed as to MSEIA's concerns, the situation is likely to lead to confusion and delay."

MSEIA asserts that if it is allowed to participate in settlement discussions, undue confusion and delay will be avoided. In response to the ALJ's assertion that MSEIA's interests are adequately represented by Staff, MSEIA states that it has a close working relationship with Board Staff, specifically the Office of Clean Energy, but notes that it cannot be convinced that MSEIA's interests will be adequately represented "at the bargaining table." It interprets the ALJ's order as stating that Staff "must go forward and represent MSEIA," as its surrogate in the proceedings and seeks Board clarification as to how this will transpire. Specifically, in the event the Board rules against MSEIA intervention and affirms ALJ McGill's recommendation that MSEIA participate in the proceeding, it seeks Board action requiring Staff to: (1) work closely with MSEIA during settlement talks, (2) identify MSEIA's particular interests, (3) assist MSEIA in accomplishing them to the extent this task is not inconsistent with the many other public interests raised in the Staff's comprehensive brief and (4) if Staff and MSEIA find their positions conflict, the MSEIA must be permitted to negotiate on its own at that point.

MSEIA maintains that all factors for intervention set forth in N.J.A.C. 1:1-16.3(a) have been met and weigh in favor of granting its motion to intervene and overruling the ALJ's decision. It maintains that MSEIA's intervention will not prejudice the proceedings, because MSEIA will accept the litigated record "as it finds it." (motion for interlocutory review, at 7). It maintains that absent full intervenor status, it will not be allowed to be present for settlement negotiations. As a participant, it would be kept informed regarding the status of negotiations. MEISA represents that it will not hinder the proceeding and it will take part in negotiating in good faith for the achievement of a just and fair settlement that will ensure the merger adequately advances "positive benefits for [utility] customers and the State." Accordingly, MEISA requests that it be permitted to intervene in the above proceeding.

Other Parties' Positions

By letter dated May 8, 2006, Staff submitted opposition to MSEIA's request for interlocutory review. Staff notes that MSEIA's motion should be denied on the issue of tardiness, pursuant to N.J.A.C. 1:1-14.10(a), since it was due by May 2, 2006 and was not filed until May 3, 2006. Staff's agrees with the ALJ's findings and asserts that it is too late in the proceedings for MSEIA to intervene at this time.

The Joint Petitioners opposed MSEIA's request for interlocutory review, which they maintain should be denied. The Joint Petitioners assert that MSEIA has failed to establish either to the ALJ or the Board that its expertise and full involvement as a party would meaningfully assist the Office of Administrative Law or the Board in performing their duty to evaluate the impact of the proposed transaction on competition, rates, employees, and the provision of safe and adequate utility service at just and reasonable rates. In Joint Petitioners' letter in opposition, dated April 10, 2006, they point out that MSEIA's interest in this matter rests in creating a fund for the use of its members, which would not "add measurably and constructively to the scope of the case." N.J.A.C. 1:1-16.3(a). They contend that MSEIA has evidenced a lack of interest in the record by waiting until the conclusion of the evidentiary hearings to move to intervene and that MSEIA would presumably object and attempt to obstruct settlement, which would result in attendant delay in the proceeding. Accordingly, the Joint Petitioners request that the motion for interlocutory review be denied. No submissions from any of the other parties were received.

APPLICABLE LEGAL STANDARDS

With certain exceptions not relevant herein, an order or ruling of an ALJ may be reviewed interlocutorily by an agency head at the request of a party. N.J.A.C. 1:1-14.10(a). Pursuant to N.J.A.C. 1:1-14.10(b), any request for interlocutory review shall be made to the agency head, with a copy served on all parties, no later than five working days from the receipt of the written order or oral ruling, whichever is rendered first. Within three days of receipt of a request for interlocutory review, an opposing party may submit an objection to the request. N.J.A.C. 1:1-14.10(b). Pursuant to N.J.A.C. 1:1-14.10(c), within ten days of the request for interlocutory review, the agency head must decide if the order or ruling will be reviewed. With regard to the Board, pursuant to N.J.A.C. 1:14-14.4, the Board is to determine at its next regularly scheduled meeting whether the order or ruling will be reviewed. If the agency determines to grant and conduct an interlocutory review, a party opposed to the grant of interlocutory review may, within three days of receiving notice that review was granted, submit to the agency head arguments in favor of the order or ruling being reviewed. N.J.A.C. 1:1-14.10(d). The agency head must decide the review no later than twenty days from receiving the request for. N.J.A.C. 1:1-14.10(e). The rule also provides that "[w]here the interests of justice require, the agency head shall conduct an interlocutory review on an expedited basis." Ibid. The OAL's regulations thus

allow for a two-step process for ruling on requests for interlocutory review: 1) a ruling on whether or not to grant interlocutory review and 2) if review is granted, a ruling on whether or not to reverse or otherwise modify the ruling at issue. In this instance, given the advanced state of the proceeding and since the verified parties' arguments in support and opposition of the motion for intervention were fully vetted in the motion for interlocutory review and in responding papers, the interests of justice require prompt action, in order that the proceedings not be further delayed.

The legal standard for accepting a matter for interlocutory review is set forth in In re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982). In that case, the Court concluded that the agency has the right to review ALJ orders on an interlocutory basis "to determine whether they are reasonably likely to interfere with the decisional process or have a substantial effect upon the ultimate outcome of the proceeding." Id. at 98. The Court indicated that the agency head has broad discretion to determine which ALJ orders are subject to review on an interlocutory basis. However, it noted that the power of the agency head to review ALJ orders on an interlocutory basis is not itself totally unlimited, and that interlocutory review of ALJ orders should be exercised sparingly. In this regard, the Court noted:

In this respect, the analogy to the courts is appropriate. In general, interlocutory review by courts is rarely granted because of the strong policy against piecemeal adjudications. See Hudson v. Hudson, 36 N.J. 549 (1962); Pennsylvania Railroad, 20 N.J. 398. Considerations of efficiency and economy also have pertinency in the field of administrative law. See Hackensack v. Winner, 82 N.J. at 31-33; Hinfey v. Matawan Reg. Bd. of Ed., 77 N.J. 514 (1978). See infra at 102, n.6. Our State has long favored uninterrupted proceedings at the trial level, with a single and complete review, so as to avoid the possible inconvenience, expense and delay of a fragmented adjudication. Thus, "leave is granted only in the exceptional case where, on a balance of interests, justice suggests the need for review of the interlocutory order in advance of final judgment." Sullivan, "Interlocutory Appeals," 92 N.J.L.J. 162 (1969). These same principles should apply to an administrative tribunal.

[Id. at 100]

The Court held that in the administrative arena, as in a court case, interlocutory review may be granted "only in the interest of justice or for good cause shown." Id. The Court found that an agency has the right to review orders of an ALJ on an interlocutory basis pursuant to N.J.A.C. 1:1-14.10:

whenever in the sound discretion of the agency head, there is a likelihood that such an interlocutory order will have an impact upon the status of the parties, the number and nature of the claims or defenses, the nature or scope of issues, the presentation of evidence, the decisional process or the outcome of the case.

[Ibid.

If the Board determines to review the ALJ's ruling on an interlocutory basis, in next determining whether to grant a motion for intervention, N.J.A.C. 1:1-16.3(a) requires that the decision-maker take into consideration the following:

- 1) the nature and extent of the movant's interest in the outcome of the case;
- 2) whether that interest is sufficiently different from that of any other party so as to add measurably and constructively to the scope of the case;
- 3) the prospect for confusion and delay arising from the movant's inclusion; and
- 4) other appropriate matters

N.J.A.C. 1:1-16.3(b) provides that in cases where one of the parties is a State agency authorized by law to represent the public interest in a case, no movant shall be denied intervention solely because the movant's interest may be represented in part by said State agency.

If the standard for intervention is not met, N.J.A.C. 1:1-16.6 provides for a more limited form of participation in a proceeding, called "participant" status where, in the discretion of the trier of fact, the participant's interest "is likely to add constructively to the case without causing undue delay or confusion." Pursuant to N.J.A.C. 1:1-16.6(c), the trier of fact shall determine the nature and extent of participation in any case, and participation is limited to:

- 1) the right to argue orally; or
- 2) the right to file a statement or brief; or
- 3) the right to file exceptions to the initial decision with the agency head; or
- 4) all of the above

As the Board has stated in the context of previous proceedings, these standards involve an implicit balancing test, in that the Board must balance the need and desire to allow for the development of a full and complete record and to ensure the consideration of a diversity of interests, with the requirements of the New Jersey Administrative Code, which recognizes the need for prompt and expeditious administrative proceedings by requiring that an intervenor's interest be specific, direct and different from that of the other parties so as to add measurably and constructively to the scope of the case. See, e.g., Order on Motions to Intervene/ Participate and for Pro Hoc Vice Admission, In the Matter of the Petition of Atlantic City Electric Co., et al., BPU Docket Nos. EX94120585Y, EO97070457, EO97070460, EO97070463, and EO97070466 (September 15, 1997), at 10.

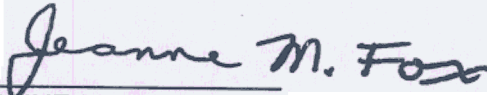
DISCUSSION

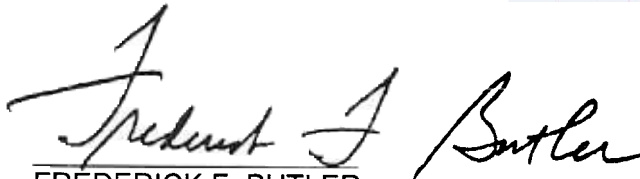
As a threshold matter, because the matter at issue herein affects the status of a potential party, the Board HEREBY GRANTS interlocutory review of the ALJ's decision. The Board agrees with the ALJ's findings that MSEIA is mainly concerned with the provision of solar electric photovoltaic power generators and the attendant benefits they create in terms of reduced fossil and nuclear generation, transmission and distribution of electricity, reduction of air pollution and stress on the electric grid, less reliance on natural gas and reduced dependence on foreign energy sources. One of the very issues in this matter, pursuant to N.J.S.A. 48:2-51.1, is the effect of the proposed acquisition on competition, and, although evidentiary hearings have concluded, there has been no finding to date on that issue. Furthermore, the Board concurs

with its Staff that MSEIA moved for intervention after the conclusion of the evidentiary hearings, without seeking to file briefs on behalf of its membership. Moreover, in MSEIA's initial motion for intervention, it sought status as an intervenor, or in the alternative, as a participant. Accordingly, the Board, on interlocutory review, HEREBY DENIES MSEIA's motion for intervenor status and affirms the ALJ's Order denying MSEIA intervenor status and granting MSEIA participant status for the reasons set forth therein. However, in order to facilitate the efficient conduct of this case and avoid undue repetition, MSEIA is HEREBY DIRECTED to consult with and work cooperatively with Board Staff, to the greatest extent possible and consistent with its interests, so as to avoid undue delay and repetition. This Order also is subject to such further directions by the ALJ or Board as may be appropriate.

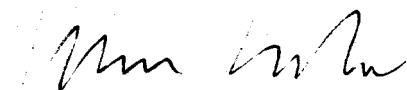
DATED: 5/23/06

BOARD OF PUBLIC UTILITIES
BY:

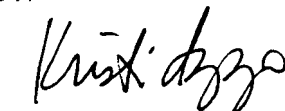

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ATTEST:


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SECRETARY

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